MEMOIR

ON

THE TRENT AFFAIR.

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PUBLICIST OF VENICE, ITALY.

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INTRODUCTION.

I owe an apology to the distinguished Publicist, AN : MICHELE COSTI, of Venice, who did me the honor to send me the memoir on the Trent affair some time since. When it reached this country I was absent, and other circumstances have prevented its publication until now. However, it is not now too late. The subject still engrosses a great deal of the public attention, and the able argument of so distinguished an European Publicist cannot fail to throw much light upon this international question of the capture of the Rebel Commissioners on board of the Trent, and to exhibit the duplicity that both the Cabinets of England and France showed in that business.

Many of my countrymen entertain a wrong impression upon this subject, and involve me in the subsequent proceedings, judging that because the traitors were given up, it necessarily implies that my action in arresting them was erroneous, and contrary to international law and precedent. Others are under the impression, because I liberated the Trent, and did not send her in for adjudication, that I committed a fault, and prevented these traitors from being tried before a Prize Court, in order to establish their guilt or innocency by the result of proceedings against the ship and cargo! Whatever disposition I chose to make of the ship, it would not have interfered with my action, as I should, in any event, have taken the rebels on board the San Jacinto for safe-keeping, until I could have delivered them up to my government. The seizure and condemnation of the Trent would have been made from other causes than having the rebels on board. This appears to have been lost sight of. The refusal of the captain of the Trent to show his papers on the high seas, and his resistance to being boarded and his vessel searched, (both belligerent rights,) were susceptible of the clearest proof, and must have resulted in her condemnation. The moderation and forbearance I exercised in liberating the

Trent have been entirely perverted. On my own account I do not regret my decision, but I do on that of my officers and men, in having deprived them of a large amount of prize money, to which they were justly entitled.

A great deal has been said about the judgments of the quarter deck on points of international law. All I have to say is, that I trust no officer holding a commission under this government will ever fail to take the responsibility of protecting the rights of his country and flag, even at the sacrifice of that commission, and that they will always endeavor to act with justice and moderation.

My countrymen will, I think, after the perusal of this memoir, fully appreciate my conduct, absolve me from all censure, and separate my action from the subsequent acts of the government, who thought proper, under the circumstances of the country, and from prudential motives, to give up the traitors when demanded by a government which had not the slightest claim to them, and whose highest legal authorities on international law have since admitted that I was fully right in taking them prisoners.

I never thought the traitors ought or would be surrendered, under any circumstances, until tried. I was always fully satisfied, however loudly the British Government inveighed against the supposed wrong or national insult, that had the demand been met with a firm denial, it would have ended in characteristic roar.

To the British Government I am partly indebted for the persecutions I have undergone since. That government seems to have made the Trent affair a personal matter against me, through Lord Lyons, its late Minister at Washington, who made, and reiterated almost weekly, unjust and paltry accusations against me, from which came the "policy" of the Navy Department in recalling me from my command in the West Indies.

I have to acknowledge the services of a valued friend for the excellent translation of the memoir.

CHARLES WILKES.

WASHINGTON, *January* 7, 1865.

THE TRENT AFFAIR.

"It can never be admitted that, with powerful governments, justice is a matter purely of opinion; that their duty has no other measure than their interest; that having the power, they may do lawfully anything that may please them; in a word, that they possess over the weak an arbitrary jurisdiction which they would not venture to exercise over their own subjects, and which they would be very far from being willing to endure from another." *Traite Complet de Diplomatie, par un Ancien Ministre*, cap. vii, sec. vi.

England makes out of the refusal to restore the confederate prisoners taken by the captain of the San Jacinto from the Trent, and of further satisfaction which she claims from the Union, a "casus belli."

Who does not perceive what revulsions a war between England and America would bring upon the political and financial condition of Europe?

Has England thought of India in which revolution was smothered, but not extinguished?

Has she considered that perhaps Ireland only awaits the moment of the withdrawal of her forces, to revolt and conquer her own independence?

Has she forgotten or not made the reflection that the Turkish question has only been postponed, not settled?

Has the proverbial wariness of her statesmen been set at rest by the many demonstrations of sympathy, which Europe seems to accord to her cause; or, has she suffered it to escape her thought, that diplomacy has its arts, looks to its ends, and never scruples what means it may employ to attain them.

Europe is eminently agitated, and threatened with a general convulsion. When? At the very moment in which she would most need peace and tranquility to provide for restoring her universally exhausted finances.

Should such continue, those debts, monetary and financial crises growing out of them, as I have already demonstrated

in my article (on the causes of the present financial involvement, and the means for mitigating the consequences,) inserted in the Official Gazette of Venice the 3d December, 1857, No. 274, and republished in 1858, in Nos. 3 and 4 of the Gazette of the Tribunals of Milan, pointing to a serious evil produced by the abuse of credit; and for the cure of it, there is no other remedy than a general political understanding, which, by assuring to all Europe an enduring peace, may permit the different States to make great reductions of their standing armies.

That which was done in 1815, to restore order to Europe, and cure her of the great ills into which a political over excitement had drawn her, ought, in a different view, to aid, in 1862, in restoring her from that financial paralysis to which the later epoch might lead her, the cause, in part, the unfortunate choice of the remedy, and the costliness of the appliances which the evil to be cured would require, and in part, that reckless spirit which, in credit, believed the chief lever of speculation to be founded, and the representative of almost universal wealth; this, if it procured for a few shrewd people, immense, almost fabulous wealth, impoverished the people of those States.

Peace tends therefore to restore public as well as private economy; and to have peace, the just desires of the people must be satisfied; those desires being satisfied, naturally, disturbances come to an end, the repression of which, compels the governments of nations to burden their subjects with taxes, and to improverish not only the public treasury, but to increase to a fearful extent the public debt for the maintenance of armies only, which needs not be demonstrated; as soon as the reflection occurs, that the bloodshed which, since 1815, has moistened the various countries of Europe, has been owing to the discontents of the people more than to external causes, and the conflicts of states, through violations of international law, produced by their quarrels. By satisfying, therefore, the just wishes of the people, as above mentioned, the uselessness of keeping up all those powerful armies becomes plainly manifest, and by restoring those unemployed and strong arms to agriculture, to manufactures, and to trade, will be attained the restoration of Europe and the world to that condition of ease and competence which could not be hoped to be given to it in any other way; otherwise, such are the universal conditions, that I, may God avert the fatal presage, see not

far distant, if the expression may be allowed, a tremendous deluge of blood.

Have the rulers of the nations thought that nations were not made for princes, but princes for nations; that the power which divine Providence has entrusted them with ought only to be bent upon promoting their welfare, the happiness of those subjects over whose destinies they have been placed to preside; that their welfare, their own happiness cannot be disconnected from them; in fine, that the true ambition, the true happiness of princes, cannot consist in the number, greater or less, of the individuals subject to their government, but in the greater prosperity, and greater happiness which they shall succeed in procuring for them? Theirs will be (if it be allowable in important matters to make use of small illustrations) the satisfaction of the rich man, to whom is given to relieve the indigent in their misery; and on the other hand, the torment of the miser, who, disturbed by constant fears, living in squalid want, dies with the terrible anguish of being compelled to leave the accumulated and, for him, unfruitful riches.

If princes shall understand this, the laws of the sacred scope of their true mission, they will agree in satisfying the not unknown just expectations of the people, and with their benedictions they will realize the true, the only ambition which can fully satisfy their minds, that of having brought to the world peace and enduring prosperity.

But to this great work England is necessary. England must not involve herself in a war with America. The scattering of her strength would be fatal for herself and for Europe.

If England, in this ill-omened emergency, ranges herself on the side of right; if the good offices, the mediation, of the European powers do not succeed in obtaining for her the reparation due, all Europe ranges itself on her side, makes common cause with her to constrain America to apologize, and the contest would be prolonged; but if England should be found in the wrong, not only the sympathies but the power of Europe will be engaged in sustaining the just rights of those who, in her proud strength, she would oppress; and although their good offices, their mediation, should prove useless, the powers of Europe would array themselves on the side of America, make common cause with her, and the struggle would alike be prolonged.

I apprehend the objections which will be opposed to me; but the case, in my opinion, is exceptional, and the moment

of time controlling. That war must, under existing circumstances, be prevented.

Was the English flag the least insulted by the capture, made by the San Jacinto, of the Confederate Commissioners on the Trent? Was international law violated by that fact?

Such is the theorem. On the solution of this must absolutely depend the attitude which the powers of Europe ought to assume for or against England. I, therefore, think the outburst of the *Times* to be inconsiderate, carried away more than on other occasions by an unreflecting national pride, when, in the stir occasioned in that country by the first advices, it said: "We have sent a despatch to Washington, not to open discussions, but to demand the restoration of the persons unlawfully captured. When that restoration shall be made, then it will be satisfactory to our minds to discuss the question of international law as much as the Americans shall choose."

This language, which, with the haughtiness of the *sic volo, sic jubeo*, that should have been omitted, commingles irony, makes a singular contrast, not only with the mildness of the sentiments of justice and of conciliation, expressed in the argument of the American General Scott, in his letter inserted in the *Constitutional*, but likewise with that used by the government of its own country in the instructions to its own representative in America, Lord Lyons, in which, albeit maintaining its proper dignity, it wrote expressly, so far as the journals tell us, "with such wisdom and moderation, that the proudest American could not but say that the course of his own country has been swaggering towards the other."

The impressions awakened in me by the announcement of this incident, was at once in favor of the San Jacinto, and I have become more and more convinced that Captain Wilkes was in the right when he visited the English steamer Trent; that he stood not only on his right, but was acting in his strictest course of duty when he captured the commissioners found on board, and was inspired with the principles of generosity and liberality in favor of neutrals always contended for by his own government, of which he gave an example of very rare generosity in renouncing a very rich prize, out of consideration for all those of other States who might have important interests on board that vessel, when, instead of making prize of her, he allowed her to pursue her course, giving by this mode of action a notable and memorable example to all maritime nations, and chiefly to England, how belligerents ought to exercise the

rights belonging to them in regard to neutrals. And, I was greatly surprised when I found the action generally disapproved, and more still when informed that the law officers of the crown of England had concluded that the right of the Federal Government was restricted to visiting the Trent, and if the vessel carried persons and effects that were supposed to be contraband of war, he ought to have taken her into port, and have submitted the question to an admiralty court, which would have taken testimony, and listened to contradictory allegations, so as to decide the question afterwards, according to equity, as is the usage among civilized nations; that would be to pretend, as General Scott excellently well said in his above-cited letter, "that the offence of the Union officer would have been much less, if his offence to the British flag had been much greater; that it would have been mitigated, if, in place of capturing the four rebels, he had made prize of the vessel, detained the passengers several weeks, and confiscated all the cargo."

But, when it is besides brought to mind that in international relations, the establishment of the violation, at least, of an international right, is to depend upon the decision of a tribunal of one of them, to which a citizen goes, and for his especial interest takes recourse, to obtain its recognition of his possession of property, which he believes he has acquired by the right which the violation supposed would have given him: what then?

For the relations between State and State no courts exist. Admiralty courts are called upon to decide controversies between the captor and the captured, and so decide upon the lawfulness or unlawfulness of the capture, in the case, it is true, of an alleged violation of an international law, but exclusively in the particular interests of the contestants. The decisions of Admiralty courts are not obligatory upon States not parties in the cause, and cannot possibly be called in to make their own statement, or to give explanations—the procedure for the purpose of determining their controversies is very different, and very different are their judges.

The thunder of the last cannon is that which decides between them, that is judgment and argument at once.

Grant, in our case, that the judgment of an Admiralty court was not possible, because Captain Wilkes had, by his renunciation of the capture, thus rendered its recognition vain; but while renouncing the capture for himself, he could not in like manner renounce the right pertaining to

the State of which he was a citizen, whereby the question as to the two States between themselves always remains whole and unprejudiced.

If such is not the opinion arrived at by the law officers of the crown, as some journals have said, it is the general opinion of the jurisconsults and publicists of Europe; and I was waiting to see the development of the arguments, on the basis of which the pretended violation could be sustained, so that I might perchance convince myself of the error into which I had fallen; and the rather because of the opinion to the contrary; advanced by some, that those commissions should have been considered as something contraband of war; this would be to confound persons and things, which I cannot persuade myself to do; nor as little, in view of very sage and well-weighed reflections, have I succeeded in satisfying myself, through the brilliant article, with the P. S. of Mr. Agenor de Gasparin, published in the *Journal des Debats*, of 12th and 13th December, 1862.

That article, through the eminently conciliatory style in which it is written, produces on me the idea of a peroration for peace between the two Powers, rather than that of a vindication of the action of Captain Wilkes, which leads him, in place of praising it, as in my opinion he would have done if he had caught the true point in question, to censure it, albeit gently.

Beyond this, of the views of individual publicists who might deserve to claim attention, I have not gathered anything from the few journals which I have read, and in the very little time I can devote to them.

I find in these that the jurisconsults of the United States have expressed opinions that the capture was lawful, but the reasons either have not been made known, or have not come to my notice.

That which arrested my attention, in a sense opposite to the opinion last expressed, was a dispatch from the Minister of Foreign Relations of France, directed to her Minister at Washington, in which, disapproving of the conduct of the captain of the San Jacinto, he endeavors to induce that government to adopt the same opinion, and to defer to the requests of England, considering the fact to be of such emergency as might produce deplorable complications, as said in the despatch, in all the aspects of existing difficulties by which the government at Washington is already burdened, and as a precedent tending to disquiet those Powers which are now aloof from the contest. So likewise,

Count Rechberg and Count Bernsterff, Ministers for Foreign Affairs of Vienna and Berlin, in their respective dispatches, addressed to their representatives at Washington, the 18th and 25th December, have expressed themselves in the same sense to induce the government of the Union to accord to England the satisfaction sought for, but it is to be observed that neither the one nor the other discusses the question of *the right*, and both limit themselves to disapproval of the act, and to persuade to conciliation by granting at once all that England asks.

As to Russia, nothing is known except that from the beginning of the controversy she has put in operation at Washington all her influences in favor of peace, and has quite recently taken some steps in that direction, and communicated to all the great Powers the reports received from her Envoy in that country.

Thus, as the question of *right* is involved only in the dispatch of the French Minister, I assume to make that the subject of my remarks. I set out with a fact which I consider to be among the points most clearly ascertained and which does not seem to admit of contradiction.

The steamer Theodora, conveying Messrs. Mason and Slidell, Commissioners from the Confederate States to the English and French governments, together with their respective secretaries, Messrs. McFarland and Eustis, broke through the blockade of Charleston, and reached on the 18th of October the Havana, where a public reception was given the aforementioned gentlemen.

On the 7th November they embarked at the latter port on the English mail steamer Trent, to go thence to St. Thomas, there to go on board another mail steamer, the La Plata, directly to Southampton.

The Trent departed with a full cargo, worth $1,233,000 in specie, reached the old Bahama channel; at meridian on the 8th, Wilkes, captain of the United States steam frigate San Jacinto, took measures to visit her, and upon this, the abovementioned gentlemen were arrested and transferred to the San Jacinto, leaving the Trent then to pursue her course.

The dispatches of the Commissioners did not, however, fall into the hands of the Americans, but were received in England.

The character of Commissioners from the Confederates, belonging to Messrs. Mason and Slidell, and their destination, was admitted by themselves at the time of their cap-

ture, and proclaimed by the President, Jefferson Davis, in his message to Congress.

It has never been questioned that this was previously known to the captain of the Trent, who certainly above all could not pretend to be ignorant of the difference existing between England and the United States on account of the blockade established by the latter along the southern coasts, and he should the more have well considered the steps he was about to take, so as not to compromise his own flag.

For the rest, the title of Commissioners given to Messrs. Mason and Slidell, disposes beyond all question of the solution of this question; it was sufficient that they were Envoys of the Confederate States to other Powers.

I shall not occupy myself with the details of the capture; and especially, of the captain of the Trent having objected to the right of visit, and having attempted to conceal the presence of the Commissioners, of refusing to produce the passenger list, and bills of lading, as appears by the report of Captain Wilkes to the Secretary of the Navy of the United States—facts which have not been denied, and would of themselves alone have justified the capture of the vessel.

I do not deem worthy the honor of confutation, what is said by the *Times*, for the purpose of taking out of the case all the consequences deducible from the precedent statement, and then sustaining the exemption of the English mail steamer, on the ground that in other times "steamers had no existence, mail bags which carried letters in which all nations were interested, were unknown," but that international law, which was in existence at the time when these very useful means of communication were introduced, has not excluded them from the category of merchant vessels, nor screened them from the right of visit; they can be used as principals or accomplices in contraband trade, or, for acts of hostility, just as readily as any other merchant vessel, and therefore must be subject to the right of visit, and all its consequences.

The question at any rate, must on that point be decided in favor of the captain of the San Jacinto by the law officers of the crown, as I have said above, therefore I give my attention solely to the fact of the capture of the Commissioners.

I admit in all its breadth the *territoriality* of neutral vessels, whether of war or commerce, which I have already under other circumstances upheld, (see my article on the unlawfulness of the capture of the Cagliari, and the consequent

right to indemnification in the Gazette of the Tribunals of Milan, Nos. 130, 131, 132, of 1858,) with the necessary limitation thereon, admitted by international law, as to the right of visit, reserved to the vessels of war of belligerent parties, and I also look upon this in the most liberal sense, even when it happen that the belligerent party has well-founded suspicion that the vessel he wishes to visit would be found in contravention of the obligations of neutrality.

The fact that those Commissioners had embarked on that vessel was already known to the captain of the San Jacinto, as we have it from his second report to his government, and the result proved it.

I call to mind that the sources of international law are reduced to three, the law of common sense, the law of custom, (which some publicists distinguish as tacit conventional,) and conventional law.

I call to mind, in respect to the last source, that the law which grows out of stipulations between parties has ordinarily for its scope some change or modification of the rule which otherwise would be found in the law of custom, or in the law of common sense, or else, to remove doubts, which in some contingencies the one or the other might leave open, and thus to prevent future disagreement and questions which might easily spring up between the contracting parties.

With this, I address myself to an examination of the despatch of M. Thouvenel, Minister of Foreign Affairs of France, addressed to M. Mercier, her representative at Washington, and of which I have made mention above.

The arguments which are brought forward in that despatch to maintain the unlawfulness of the capture of the Commissioners are reducible to four; which, in order to avoid, in so delicate a matter, mistaken constructions, I set out in the identical words of the despatch.

(*a.*) "The United States, in this case it is said, have admitted, with ourselves, in the treaties concluded between the two countries, that the freedom of the flag extended over persons on board, although they might be enemies of one of the two parties, with the exception that military men actually in the enemy's service are not so included. Messrs. Mason and Slidell were then, by virtue of this principle, *which we have taken pains to cause to be inserted in our treaties of amity and commerce*, perfectly free under the neutral flag of England."

(*b.*) "It will not be pretended, without hesitation, that they should be considered as contraband of war. What constitutes contraband of war, is not yet, it is true, precisely determined, its limits are not absolutely the same with all nations; but in this case, which relates to persons, the special stipu-

lations which are found in the treaties concerning military men define clearly the character of those who alone may be captured by belligerents. Messrs. Mason and Slidell could not be likened to the persons in that category."

(*c.*) "There would remain, then, no reason to give for their capture, except the pretext that they were the bearers of official despatches to the enemy; but here it is proper to recall a circumstance which controls the fact and renders the conduct of the American captain unjustifiable. The Trent was not bound to a place belonging to one of the contending parties. She was conveying to a neutral country both passengers and cargo, and she was on her way from a neutral port. If it were possible to admit that under such conditions the neutral flag would not entirely cover the persons and merchandise conveyed, its immunity would be no more than an empty word. At any moment the navigation and commerce of third parties would suffer in their peaceful and even indirect intercourse with the one or the other of the contending parties. They would not only have the right to exact from neutrals the strictest impartiality, and to prohibit any intervention in the movements of wars, but would destroy that freedom of commerce and navigation, which, on the other hand, modern international law has sought to sanction; would introduce, in fine, injurious and pernicious practices, against which, in other times, no government has more strenuously protested than that of the United States."

(*d.*) "If the Cabinet of Washington should be unwilling to consider the two persons arrested except as rebels, whom it is always lawful to capture, the question, considered even in that aspect, could not be solved in favor of the captain of the San Jacinto, because a ship is portion of the territory of the nation whose flag it bears, and it would have been a violation of that immunity which does not allow a foreign sovereign to exercise his jurisdiction there It certainly is not needful to recall to mind with what vigor the government of the United States has defended that immunity, and the right of asylum, which is its consequence."

Reserving for the solution of this question a more ample development, when I shall discuss the principles of my theory of the lawfulness of the capture of the Commissioners, I will previously clear away from the foregoing arguments what they contain that is erroneous and paradoxical.

As to (*a.*) It is a principle universally recognized and admitted that treaties are of no avail, nor can have any jurisdictional effect, excepting upon the parties who have concluded and ratified them. But even if the expressions used in the treaty between France and the United States had been more explicit, and not left room for a construction which surely would not favor the assumption of M. Thouvenel, it would always hold good that the effect thereof could not be extended in favor of England, with whom a similar treaty does not exist.

To demonstrate, more especially, if not already done, that those treaties should be restricted to the relations only be-

tween the parties contracting, not admitting of any extension whatever of this application, I avail myself, first of all, of what M. Thouvenel has to say about this, of the great pains which France had long taken to have inserted in her treaties the principle above written; and, in fact, if she had to take pains, that of itself demonstrates that the other party, in condescending to her persistence in her wishes—I say it in the way of exception—plainly demonstrated unwillingness to accept the principle as a rule, but that it should be so restricted as to have effect only and exclusively between the stipulating parties.

In the second place, it pleases me to recall a fact posterior to the epoch of the French treaties, (1778–1800,) from which it appears that England had no thought nor wish that those treaties should be extended in regard to herself, having, on the contrary, combatted the principle; and I gather this fact from a correspondent in Paris of the "*Nation.*"

It appears from that correspondence that in 1804 negotiations were undertaken between England and America to settle the exact definition of the right of visit, as, in the projêt of the treaty drawn up at Washington by Mr. Madison, America proposed that from the immunity of the flag none should be excluded except *persons employed in military service;* and, on the contrary, England, by proposing to strike out the word military, implicitly recognized the right of arresting on board of neutrals any person employed by the belligerents.

Now as England desired to exclude from the protection of the flag any person employed by the belligerent party, how will M. Thouvenel be able to insist that the English flag should protect by its immunity the envoys of the belligerents of the South?

If that, in the opinion of the *Independence Belge*, would not constitute a *precedent*, *precedents* would be of no force, and upon this, says the *Times*, in some remarks not without importance, these precedents would not constitute a right for any one, not England herself, nor other maritime powers. If England has allowed herself to be drawn into frequent abuses of power, that is not a good reason for concluding that these abuses have become law; and to these the adage cannot be applied, *Patere legem quem feciste*, because, to violate laws is not to abolish them. And I entirely agree upon this principle when abuses and arbitrary acts are treated of, but when historical precedents are adduced for the interpretation of treaties, and to establish beyond question the intentions of the contracting parties, and that,

on the other hand, the principle by this means to be settled not only does not conflict with but conforms to international law, as I shall hereafter demonstrate, I cannot exclude their applicability.

As to (*b.*) I admit that the Commissioners could not be regarded as contraband of war, as M. Thouvenel says, but not for the reasons mentioned by him, but because of what I have before said, that such contraband relates to things, and not to persons. In fact, in no treaties, by no publicists, are persons ranked in the class of contraband of war. That they are not comprehended in it, in greater or less degree, is true, but invariably the things which more or less directly can assist the war, or prolong it.

As to (*c.*) M. Thouvenel, regarding the Commissioners as bearers of despatches, (and that such was the fact is in proof, and if they had arrived in England would have been looked upon as invested with some public character, it is not possible otherwise to imagine,) admits, rather than proves, that they could not have been included among contraband of war, but I cannot for this shut out the fact, nor certainly would the Minister of France, that the carrying of despatches *for account* of the enemy constituted an act of *hostility*.

But if the carrying of despatches is considered by publicists as a greater infraction of the duties of neutrals than carrying contraband of war, how plainly greater the infraction in carrying persons invested with public character and with power, not merely referring to and limiting their functions by the despatch, but beyond that, to treat of, to agree upon, to intrigue to the greatest extent to injure the adversary.

Upon this, and less cannot be made of it, the violation by the Trent in carrying these Commissioners must be regarded as more serious and dangerous than if she were carrying a despatch, by which she would, with very good right, have subjected herself to the law of capture.

The interdiction, then, as to the carrying of despatches, arising from the circumstance that the communications to either contained in them might prejudice the one and benefit the other belligerent, excludes any question about the port from which they depart; also what their destination; and for this reason, it does not in any way avail the Trent that she left one neutral port, and was bound to another neutral port, as M. Thouvenel would maintain.

If it were in question, for example, about a body of troops destined to one of the belligerent parties, what influence

would such a circumstance have? Is it not true that this would not have taken away from the action that character of partiality which constitutes a hostile act, and is therefore an infraction of the laws of neutrality? And in what is the difference where despatches come in question?

In no treaty, within my knowledge at least, are contrary principles settled. They would, on the contrary, be in opposition to plain common sense, and in fine, to the last acts of France herself.

In the report upon the facts, made to the Emperor by M. Drouyn de l'Huys, on the 29th March, with which he laid before him the *declaration relative to neutrals, letters of marque*, &c., agreed upon with the British government, and which was approved by the Emperor himself, in accordance with another like approval by the Queen of England, on the 24th March, of that year, we read: "It is impossible for his Majesty to renounce the right to seize articles contraband of war, and *to prevent neutrals from carrying despatches for the enemy*," and in the instructions relating to this, sent by the Minister and Secretary of State for the Navy Department, Theodore Ducos, to the generals, superior officers, and commanders of squadrons of his Imperial Majesty, dated 31st March, 1854, at Paris, in conformity throughout with those emanating from the English government, they are enjoined to capture whatever merchant ship which, unless by special license," * * * * "should seek to violate a blockade, or should engage in the carrying *of troops, of official despatches, or of contraband of war on account of*, or destined for, the enemy."

The argument, therefore, on which M. Thouvenel rests, besides being contrary to all these principles, is also to his own *precedents*, and also to those of the English government, as proven in their acts and matters of recent date, that it is sufficient to render a mercantile vessel subject to capture if she had carried *official despatches, on account* of the enemy, and that, without regard, as has been said, to her port of departure or destination.

The saying of M. Thouvenel is quite an error, that if the neutral flag should not completely cover both persons and merchandise, its immunity would be nothing but an empty phrase. I will say, on the contrary, that it would be pre-eminently an empty phrase, if the neutral flag should cover both merchandise and persons. And that such opinion is correct is proved by the declarations of the plenipotentiaries who signed the treaty of Paris of the 30th March, 1856,

bearing the date of 28th April following in the appendix to the same, by which they established the principles—"Article 2d. The neutral flag covers enemies' goods except contraband of war. Article 3d. Neutral goods, with exception of contraband of war, cannot be confiscated under the enemy's flag." No mention is made therein of the flag covering *persons*. A silence such as that is a plain indication that it was not the intention, at this latest period, to give those advantages which at the first had been favorably regarded.

A vessel can in fact only carry things and persons—the first being admitted to protection, the others remain explicitly and necessarily excluded from it.

Nor can it be said that in the other case another right would be violated, that of asylum, which the territoriality of the vessel would impart to the person; but, the right of visit being admitted, beyond contradiction on any side, that of territoriality is subjected to a limitation, which, if it do not rigidly deny that such right can possibly be guaranteed to persons who, though enemies, have thus sought and obtained refuge, and evaded the pursuit of belligerent parties, yet will not allow that such immunity can be secured for those who have not sought asylum, but have sought and taken passage exclusively for the purpose of doing injury to the opposite belligerent, as I will shortly more fully demonstrate.

The suggestion, then, of M. Thouvenel, that in the other case the navigation and commerce of third parties would suffer injury, is an argument which by its extravagance deprives it of all strength, for it would apply in any case whatever, and that would destroy the right of visit.

To (*d.*) In responding to the argument under letter (*c*) I have anticipated my opinions, as to what might be offered under this letter.

The question is not, that, according to the law, where a vessel has given asylum to a rebel, he is not guaranteed under the *territoriality* in which he is placed; our question, the true question, is, whether giving passage on a vessel, or, in other words, granting asylum to a rebel—who on all sides it is known makes use of it exclusively to promote the strength of his own party, better assure the result of rebellion, and thus bring about the defeat of the opposite party—is not to become an accomplice in an act of hostility, and therefore, whether such act does not constitute a violation of the rights of the adverse party, by reason whereof he would be author-

ized to avail himself of the powers accorded him by international law in respect to neutrals.

The distinction between *public* war and *civil* war, hardly calls for notice—no one can doubt that *civil* war is that which is now carried on between the United States and the Confederates, in America; and so much the less, because England has recognized such to be the case in her proclamations, and has received in her ports, as other European powers have likewise done, as well as France, the vessels of the one and the other without any discrimination between them.

This being premised, no one can doubt that the rules which must be followed in *public* war, must likewise be followed in *civil* war, and this not only on the part of belligerents, in particulars regarding themselves, but also by foreign powers in everything concerning their neutrality in their relations with either party.

These are such elementary ideas, that they need no demonstration, nor authority to sustain them.

Leaving aside questions upon the definition of neutrality, which give cause for controversies between publicists who would extend more or less the limit of the rights of belligerent parties, it seems to me that the idea deduced from the etymology of the word *neuter*—neither the one nor the other—neither for the one nor for the other of the belligerents—offers the most just and the most philosophic criterion for establishing the *status* or condition for neutrals, both for them and their rights, and their duties in respect to the belligerents, in all that which relates to war, and which certainly can only be definitively settled by negotiation or by conquest.

The neutral, then, true to the principles of the law of common sense, must omit whatever, in relation to war, might increase the material or moral force of one of the parties, by which it might sway the issue depending in favor of the one to the prejudice of the other.

For this reason contraband of war is prohibited; for this, the transmission of despatches, which sometimes do the greatest injuries; for this, the transportation of troops; but are these the only acts, because they only are spoken of in treaties, which according to the law of common sense are prohibited to neutrals?

Will the carrying of embassadors, legates, or like representatives, be privileged for neutrals, and will it not constitute an act of hostility by reason of which the right of visit

will be exercised, and the capture of such carrying ship, and such legates?

I shall not invoke upon this question the authority of those publicists, who, without distinctions, admit not only the *power to forbid* but the *power to prevent;* nor shall I rely at all on those others who maintain that they cannot be carried without a safe-conduct issued by the adverse belligerent, and may, without that be captured—among them I might even cite some Englishmen. I desire to go further, to grant more than the most liberal publicists, to place public ministers of belligerents upon the same level as despatches, and, as to this it is held by many that neutrality cannot have been violated by the carrying of a despatch from a belligerent party to its own minister resident near a neutral power, because *war should not interrupt the pacific relations subsisting between the belligerents and the neutral nations;* I will admit this maxim also in regard to carrying a minister. But the case in question is very different.

The second Federal act of the United States of America, does not recognize in the States of which that Union is composed, the right to be represented *abroad.* Such right is reserved to be exercised through the President, who as such is invested with the executive power.

The United States of America, had, as at all times they have had, their representatives both at Paris and at London; the mission therefore of Commissioners on the part of the Confederates, was an infraction of the covenant, never till then broken; it had not for its object *the maintenance of pacific relations*, which in the first place, in their particular regard, had not subsisted, nor could subsist; that mission was intended, on the contrary, to disturb those already subsisting, and to endeavor to excite anew injury to those opposed to them, and practically to increase their embarrassment, and their difficulties, and much more strongly assail them.

But if the Trent, entrusted with a despatch which was intended for that purpose, was pursuing her course in an infraction of neutrality, and in an hostile act, with how much greater reason ought she on this account to have refused to receive the Commissioners, incarnate despatches, as Captain Wilkes might say, who not only had authority to refer, to propose, but also to treat and to conclude, to carry out, in fine, every device to the injury of the Union.

The hostility, then, which the Unionists displayed against that mission was fully justified by the right of lawful de-

fence, springing out of the supreme law of self-preservation, and it was the extreme of liberality and generosity, as I said, that Captain Wilkes, authorized fully by an act which involved participation in hostility, and gave to him the right of defence, forebore the capture of the vessel and her rich freightage, and contented himself with the capture of the Commissioners and their secretaries. I moreover say that the captain was not only acting on his right, but may also say that he was acting within the strictest line of duty; wherefore, if in place of capturing them he had let them go free, he would have fallen into the offence of collusion against his country, and thus of high treason.

The having allowed, therefore, this vessel to prosecute her voyage ought to have satisfied the pretension of the *Times*, so that the reproof which it addressed to the captain of the San Jacinto for not having regarded the Trent as a mail steamer, should be changed into his great praise; ought to have called forth, not its anger, but its satisfaction; exactly because by leaving her to prosecute her voyage, he demonstrated that he fully comprehended all the respect which, by virtue of the most recent progress, was to be extended to mail steamers, for which Captain Wilkes should expect the gratitude and applause not only of individuals, but of the governments essentially benefitted, as well as the praise of all neutrals for the noble example he had given, which will add strength to the expectation that all the powers may agree to follow out the liberal principles which this distinguished officer has inculcated.

But allow me to return to the treaties to which M. Thouvenel refers.

The treaty of friendship and commerce, to which he alludes, is of the 6th February, 1778, which, in article 23d, after other provisions favorable to the freedom of their respective navigation and commerce, and establishing the principle that the flag covers the cargo, excepting contraband of war, continues: "It is likewise agreed that this immunity shall extend to persons who should be found on board free ships, *even although they should be enemies of one of the parties contracting*, and they should not be taken from such vessels unless of the military class and in the actual service of the enemy."

Another treaty of France with Bolivia of the 9th December, 1834, accords very nearly with the terms of that treaty in article 18th, and other treaties of the same power, whether

with others in Europe or America, to which it is needless to refer.

It may be said that England alone is wanting, and we already know on what terms she finds herself with the United States upon this question.

If we had not made account of the exception in comparing her with others, we might have supposed that the treaty which binds France and America was also common to England. And here I will ask of every one, M. Thouvenel not excluded, whether he considers (I omit to draw any inferences from the treaty between England and Holland of 1654, article 11) that if at the time of the Indian mutiny a vessel of the United States were found, under such circumstances as the Trent, carrying commissioners from the insurgents to solicit aid and protection in Europe, the commanders of English ships of war would have allowed such ill-omened steamer to pursue her course with those commissioners?

I will suppose an insurrection to happen in the French colonies. I raise the hypothesis as in the case of England, and I ask, if in view of the treaty of 1778, French cruisers should capture rebel commissioners, M. Thouvenel, upon representation made to him by the Cabinet at Washington, would be ready to release the commissioners, and grant them all the satisfaction he would now induce them to give to England?

I cannot believe it, and this I maintain upon sound law, and within the terms of the treaty. And in effect who are the persons who by the treaty shall be left at liberty? *Persons who are enemies of one or the other of the contracting parties.*

But, under that impression it does not follow that *rebels* are comprised, although in the relation with neutral Powers they might have been treated as enemies; in those, between insurgents and the government against which they have revolted, even if from views of humanity and reciprocal advantage they may have enjoyed privileges which are accorded between enemies, in public wars, and for that reason are not treated as guilty of the crime of rebellion, they nevertheless, have not ceased to be considered as *rebels*, for these do not hold their adversaries to be enemies, but *tyrants* and *usurpers;* this excludes the idea that such like people can have been presumed to be comprehended among those who came under the contemplation of the treaty now the subject of examination.

Nor let it be said that this is a legal subtlety, and should therefore be arranged among the number of forensic soph-

isms; it is a sacred principle, inseparable from international right, which cannot admit the contrary, because the contrary would be in opposition to the principle of the supreme law of self-preservation which appertains to every State, an inalienable right of which it never can be divested, and if impaired, under stipulations, must be reasserted, because by favoring the rebellion, insurrections would be encouraged, and thus the destruction of the State itself be countenanced.

But under whatever aspect the question may be considered, the capture of the Confederate Commissioners must be deemed lawful; the conduct of the captain of the San Jacinto, generous, liberal, exemplary; the pretension of England, haughty, and against law; the argument of France, paradoxical; the resistance of the Unionists, just and justified.

At the close of all this, one wish, that is—may the maritime nations agree upon the liberal and just principles which have always been put forward by America, and which she has been unjustly accused of having violated, in the relations between belligerents and neutrals, and remove from among them all those questions which in every war threaten to enkindle more extensive ones.

That the Unionists also, to avoid dangerous complications, may add generosity to generosity by setting at liberty the Confederate commissioners, but not that they may be able to return to England and France, but to return to their homes. To grant them more than this would be contrary to principle, would be to facilitate to the rebels the procurement of means of subsistence, and thus make themselves accomplices to their self-destruction.

And to close this argument, "may the strife be brief."

Note.—This memoir was dictated and in process of being copied when news came that the Commissioners had been returned to England. Let us then hope the danger of war has passed away, and that England, who has carried off a success she was not entitled to, will not avail of it adversely to a country which, to avoid a fratricidal war, made a sacrifice of her own rights.

AN: MICHELE COSTI.

Venice, *Feb.* 14, 1862.

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